IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

TRAVIS BLUE, Plaintiff, v. BRONSON and MIGLIACCIO (nka BRONSON, CAWLEY & BERGMANN), Defendant.	)	No. CV-09-1213-HU OPINION & ORDER

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HUBEL, Magistrate Judge:

Plaintiff Travis Blue brings this debt collection practices action against defendant Bronson and Migliaccio, now known as

Bronson, Cawley & Bergmann. Defendant moves for partial summary judgment. All parties have consented to entry of final judgment by a Magistrate Judge in accordance with Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I grant the motion in part and deny it in part.

BACKGROUND

Defendant, a law firm located in New York, is a debt collector. In the spring of 2008, defendant began trying to collect a debt owed by plaintiff. From the spring of 2008 through November 2008, defendant had at least twenty-three phone calls with plaintiff and made two phone calls to plaintiff's father in an effort to collect the debt.

Defendant's employees allegedly made threatening statements to plaintiff during the calls, including threats to garnish his wages and file lawsuits. They repeatedly asked plaintiff to get money from his family and friends to pay the debt. They also made statements that plaintiff considered condescending and abusive, such as calling him "irresponsible."

In August 2008, plaintiff authorized defendant to make monthly withdrawals of $200 from his bank account. Defendant told plaintiff that the withdrawals could be stopped at his request. On September 29, 2008, plaintiff contacted defendant and told one of its employees not to withdraw the $200 that month, which was scheduled for September 30, 2008. During this call, he told defendant's employees that he could not make the payment because if he did, he would not have money to pay for food and rent.

However, despite the call, defendant withdrew the $200. As a result of defendant's withdrawal, plaintiff was unable to pay other

bills and incurred bank charges. When plaintiff discovered that defendant had withdrawn the money, he contacted defendant. An employee told plaintiff they had no record of his call and told him he could not get his money back. Plaintiff had a subsequent call with a supervisor who made remarks that plaintiff considered condescending and also threatened to turn the account over to an attorney.

In addition to calls to plaintiff, defendant called plaintiff's father in August 2008. Plaintiff and his father were very close. At the time of these calls, plaintiff's father was very ill with chronic obstructive pulmonary disease. Plaintiff told defendant his father was ill and requested that defendant not call plaintiff's father any more because the calls were upsetting plaintiff's father. It is alleged the calls were so upsetting that they caused him breathing problems. Disregarding this request, defendant called plaintiff's father again in September 2008.

Plaintiff was concerned that the continuing calls to his terminally ill father could hasten his father's death. Plaintiff confronted an employee of defendant's named "Robert," about the calls to his father. Robert told plaintiff that defendant had never made any calls to plaintiff's father. This was extremely upsetting to plaintiff because he knew that calls had been made and he feared defendant would continue to call and harass his father.

After October 14, 2008, calls to plaintiff by defendant occurred on only two dates: October 15, 2008, and November 18, 2008.

As a result of the dealings with defendant, plaintiff suffered a series of anxiety attacks, embarrassment, and shame. At the

time, however, plaintiff was already having anxiety attacks as a result of the financial pressure he was under, regardless of anything defendant may have done.

STANDARDS

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"If the moving party meets its initial burden of showing 'the absence of a material and triable issue of fact,' 'the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.'" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The court should view inferences

drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. Id.; In re Agricultural Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

DISCUSSION

In his Second Amended Complaint, plaintiff brings the following claims: (1) a federal Fair Debt Collection Practices Act (FDCPA) claim; (2) a claim under Oregon's Unfair Debt Collection Practices Act (OUDCPA), and (3) a claim for intentional infliction of emotional distress (IIED).

In this motion, defendant moves for summary judgment as follows: (1) on the two debt collection claims for any violations occurring prior to October 14, 2008, and limiting the claim to the phone calls alleged to have occurred on October 15, 2008, and November 18, 2008, and (2) on the entire IIED claim.

I. Debt Collection Practices Claims

Both the FDCPA and the OUDCPA claims are subject to a one-year statute of limitations. 15 U.S.C. § 1692k(d); Or. Rev. Stat. § (O.R.S.) 646.641(3). Plaintiff filed this action on October 14, 2009. Thus, to the extent the claims are based on conduct occurring before October 14, 2008, the claims are time-barred. See Mathis v. Omnium Worldwide, No. CV-04-1614-AA, 2006 WL 1582301, at *1 (D. Or. June 4, 2006) (granting summary judgment to defendant

on FDCPA claim to the extent claim was based on communications occurring more than one year before action was filed).

Plaintiff concedes this motion. I note that while the parties agree that only phone calls made by defendant to plaintiff on October 15, 2008, and November 18, 2008, are actionable, defendant indicates that there were two phone calls (one on October 18, 2008, and a second one on November 18, 2008), and plaintiff indicates that there were three phone calls (one on October 18, 2008, and two on November 18, 2008). This discrepancy is not an obstacle to resolving the summary judgment motion. Presumably, the evidence at trial will establish how many phone calls occurred after October 14, 2008.

Additionally, while plaintiff concedes the motion, plaintiff contends that the calls outside the statute of limitations period are relevant in determining whether the calls within the limitations period were part of an abusive or harassing pattern. As I explained to the parties at oral argument, I defer resolution of this issue to the pretrial conference, although, as I explained, the evidence may well be admitted with a limiting instruction. See Mathis, 2006 WL 1582301, at *1 (while limiting the debt collection claims to communications occurring within one year of the filing date of the action, court indicated that the time-barred communications might still be relevant in determining whether the actionable communications violated the FDCPA); see also Pittman v. J.J. MacIntyre Co. of Nev., Inc., 969 F. Supp. 609, 612 (D. Nev. 1997) (court expressly held that "while the statute of limitations renders those specific communications between the defendant and the plaintiff prior to September 21, 1994 inactionable, evidence of

these prior communications would certainly be relevant to establishing whether the calls occurring within the limitations period were part of an abusive or harassing pattern.").

II. IIED

To sustain an IIED claim, plaintiff must show that defendant intended to inflict severe emotional distress, that defendant's acts were the cause of plaintiff's severe emotional distress, and that defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct. McGanty v. Staudenraus, 321 Or. 532, 563, 901 P.2d 841, 849 (1995); see also Babick v. Oregon Arena Corp., 333 Or. 401, 411, 40 P.3d 1059, 1063 (2002) (to state an IIED claim under Oregon law, plaintiff must prove, inter alia, that defendants' actions "constituted an extraordinary transgression of the bounds of socially tolerable conduct.") (internal quotation omitted).

Conduct that is merely "rude, boorish, tyrannical, churlish, and mean" does not support an IIED claim. Patton v. J.C. Penney Co., 301 Or. 117, 124, 719 P.2d 854, 858 (1986). "[T]he tort does not provide recovery for the kind of temporary annoyance or injured feelings that can result from friction and rudeness among people in day-to-day life even when the intentional conduct causing plaintiff's distress otherwise qualifies for liability." Hall v. The May Dep't Stores Co., 292 Or. 131, 135, 637 P.2d 126, 129 (1981); see also Watte v. Maeyens, 112 Or. App. 234, 237, 828 P.2d 479, 480-81 (1992) (no claim where employer threw a tantrum, screamed and yelled at his employees, accused them of being liars and saboteurs, then fired them all); Madani v. Kendall Ford, Inc., 312 Or. 198, 205-06, 818 P.2d 930, 934 (1991) (no claim where

employee terminated for refusing to pull down pants).

In a 2008 case, the Oregon Court of Appeals explained the following parameters of the tort:

> A trial court plays a gatekeeper role in evaluating the viability of an IIED claim by assessing the allegedly tortious conduct to determine whether it goes beyond the farthest reaches of socially tolerable behavior and creates a jury question on liability. . . .
>
> * * *
>
> The classification of conduct as "extreme and outrageous" depends on both the character and degree of the conduct. As explained in the Restatement at § 46 comment d:
>
> > "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."
>
> Whether conduct is an extraordinary transgression is a fact-specific inquiry, to be considered on a case-by-case basis, based on the totality of the circumstances. We consider whether the offensiveness of the conduct exceeds any reasonable limit of social toleration, which is a judgment of social standards rather than of specific occurrences.

House v. Hicks, 218 Or. App. 348, 358-60, 179 P.3d 730, 737-39 (2008) (internal quotations and citations omitted), rev. denied, 345 Or. 381, 195 P.3d 911 (2008).

Defendant moves for summary judgment on this claim, arguing that its conduct did not transgress the bounds of socially tolerable conduct, and that plaintiff did not suffer emotional distress severe enough to sustain an IIED action.

A. Conduct

Defendant argues that the alleged conduct does not rise to the level required to sustain an IIED claim. There is no evidence in the record showing that defendant used profanity or threatened violence. While defendant acknowledges that its employees made a

number of persistent and aggressive calls in an effort to collect an undisputed debt over a period of time, and according to plaintiff, defendant threatened to file lawsuits and garnish plaintiff's wages, and made statements that plaintiff found condescending and abusive, defendant argues that the alleged conduct was not so outrageous as to justify pursuing an IIED claim. At most, defendant argues, it was "rude, boorish, tyrannical, churlish, and mean," which is not enough to support the claim.

In Mathis, Judge Aiken granted summary judgment to the defendant on the plaintiff's IIED claim even though she acknowledged that "[a]busive debt collection telephone calls may support a claim for IIED, see, e.g., Turman v. Central Billing Bureau, Inc., 279 Or. 443, 447-48, 568 P.2d 1382 (1977)," and noted that "the repeated nature of allegedly harassing behavior is relevant to whether conduct is extreme or outrageous." Mathis, 2006 WL 1582301, at *7.

Judge Aiken explained that

> . . . plaintiff does not present evidence that Estate Recoveries engaged in abusive, harassing, or other "outrageous" conduct. Plaintiff presents no evidence that Estate Recoveries used profane language, issued threats, or called incessantly at all hours of the day. Rather, Estate Recoveries called plaintiff six or eight times over a period of fourteen months seeking collection of unpaid credit card debts, and plaintiff alleges that one caller engaged in "pressure tactics" when attempting to settle Account 5852. . . . However, this conduct does not suffice to support a claim for IIED. See Conboy v. AT & T Corp., 241 F.3d 242, 258-59 (2d Cir. 2001) ("Plaintiffs were not physically threatened, verbally abused, or publicly humiliated in any manner.... They were only harassed with numerous telephone calls from debt collectors. This conduct is not so outrageous as to go beyond all possible bounds of decency or to be regarded as utterly intolerable in a civilized society.") (quotation marks and citation omitted).

Id. (citation omitted).

In the Turman case, cited by Judge Aiken, the plaintiff initially received an anonymous phone call, informing her that someone from the sheriff's office would be out to her house to serve papers on her and that unless she paid her overdue bill in full to "Central Billing," her husband would lose his job and she could lose her house and everything she owned. Turman, 279 Or. at 446, 568 P.2d at 1384. The debt owed by the plaintiff was to a ophthalmologist from whom the plaintiff received ongoing treatment for a disability. Plaintiff worked out a payment plan with the doctor's clinic, despite the defendant having insisted that she not contact the clinic, but deal with "Central Billing" instead. Id. at 447, 568 P.2d at 1384.

Despite the payment plan, the defendant continued to call the plaintiff demanding payment. Id. at 447, 568 P.2d at 1385. The caller became irate upon learning of the plaintiff's payment arrangements, shouting at the plaintiff and threatening her. Id. Despite the plaintiff's explanations of why she had to maintain good relations with the clinic, the defendant continued to demand immediate payment and to threaten to take away the plaintiff's husband's job and their home. Id. at 448, 568 P.2d at 1385. The plaintiff was in tears.

After calling a friend to come over and keep her company because she was so upset, the defendant's agent called again, while the plaintiff's friend was present. Id. The friend testified that the defendant used swear words and had "quite a vocabulary." Id. The caller continued to use profane and abusive language, including calling plaintiff "scum" and a "dead beat," and told plaintiff she could care less about plaintiff's being blind. Id.

The facts in the instant case fall somewhere between the scenarios present in Mathis and Turman. While I think this is a close question, for the reasons explained below, I agree with plaintiff that the facts at least create a jury question on the issue of defendant's conduct.

First, because the IIED claim carries a two-year statute of limitations, the calls to plaintiff's father and the September 2008 withdrawal of money from plaintiff's bank account, are properly considered in assessing defendant's liability on this claim. While, as in Mathis, there is no evidence of profane language or calling at hours of the day, a reasonable factfinder could conclude that defendant crossed the boundary into socially intolerable conduct because of the calls to plaintiff's father, especially the call after defendant was on notice that plaintiff did not live with his father, that plaintiff's father was ill, and that calls to plaintiff's father upset his father and exacerbated his symptoms, and because of defendant's unauthorized September 2008 withdrawal from plaintiff's bank account, despite plaintiff's request that defendant hold off on that withdrawal because it would leave plaintiff without money to pay for rent or food.

Second, as the House court recognized, the "character and context of particular conduct frames its categorization as outrageous or not." House, 218 Or. App. at 360, 179 P.3d at 737. As far as character is concerned, "the illegality of conduct is relevant to, but not determinative of, whether the conduct is sufficiently outrageous to support an IIED claim." Id. at 359, 179 P.3d at 737. I make no judgment at this stage as to whether defendant's conduct actually violated the FDCPA or the OUDCPA, and

I recognize that the pre-October 14, 2008 may not be considered in the assessment of defendant's liability on the debt collection practices claims. But, the summary judgment record raises enough concerns about the legality of defendant's conduct to support denying defendant's motion on this issue.

As to the context of the conduct, a debtor-creditor relationship, such as the one here, and as existed in Turman, is a recognized "special relationship" that "imposes on the defendant a greater obligation to refrain from subjecting the victim to abuse, fright, or shock than would be true in arm's-length encounters among strangers." Id. at 360, 179 P.3d at 737 (internal quotation omitted) (citing Turman for the proposition that the debtor-creditor relationship is one type of special relationship). The fact that the debtor-creditor relationship is one such "special relationships" is likely a recognition that "[t]he purpose of the FDCPA is to protect vulnerable and unsophisticated debtors from abuse, harassment, and deceptive collection practices." Guerrero v. RJM Acquisitions LLC, 499 F.3d 926, 938 (9th Cir. 2007); see also Thomas v. U.S. Bank, N.A., No. CV 05-1725-MO, 2007 WL 764312, at *9 (D. Or. Mar. 8, 2007) (describing the FDCPA as the "federal corollary" to the OUDCPA). The purpose of the statute and the context of the relationship are relevant to the issue of the outrageousness of defendant's conduct and here, that issue is properly left to the jury's determination.

B. Severity

Defendant separately attacks plaintiff's evidence as to the severity of his distress, arguing that it is insufficient as a matter of law to support the IIED claim. Defendant acknowledges

that the summary judgment record shows that defendant's calls caused plaintiff to suffer anxiety attacks, shame, and embarrassment. But, defendant notes that plaintiff was already suffering from anxiety attacks because of his financial troubles and that the nurse practitioner who treated plaintiff could not recall plaintiff citing distress caused by phone calls from defendant as a basis for treatment.

Defendant relies on Bergin v. North Clackamas School Dist., No. CV-03-1412-ST, 2005 WL 66069, at *23-24 (D. Or. Jan. 12, 2005), where Judge Stewart first set out the relevant law regarding the requisite severity:

> To be severe, distress must be more than mild and transitory. . . . Accordingly, the intensity and duration of a plaintiff's emotional distress are primary factors to determine severity. . . . The distress must be more than hurt feelings. . . . Instead, the distress must be so severe that no reasonable [person] could be expected to endure it.

Id. (internal quotation and citations omitted)

Next, Judge Stewart noted that there was an issue of fact regarding the source of the plaintiff's depression because the plaintiff conceded that sources other than the defendant's conduct contributed to her depression. But, Judge Stewart held, even assuming that the defendant in the case was primarily responsible for her depression, the plaintiff had still failed to demonstrate that her distress was so severe that no person could be expected to endure it. Id. The plaintiff cried after a meeting and eventually needed to ask for leave in order to deal with her depression. Id. This was not enough to demonstrate severe emotional distress. Id.

Plaintiff contends that he experienced severe distress not only because of the calls made directly to him, but also because of

the distress caused by calls to his father which triggered his father's disease symptoms and created fear for plaintiff that his own personal problems may hasten his father's death. Additionally, plaintiff states that defendant's unauthorized withdrawal of funds in September 2008 added to his distress. Plaintiff contends that he has at least created an issue of fact regarding the severity of his distress.

I agree with plaintiff. The jury could conclude that the primary source of plaintiff's anxiety was plaintiff's financial situation, unrelated to defendant's conduct. Or, the jury could conclude that the primary source of his anxiety was defendant's conduct. Additionally, the jury may determine that plaintiff was perhaps more susceptible to distress than other debtors because his financial situation was so dire, as seen by his testimony that the September 2008 withdrawal left him without money for rent or food, and because the calls to his father created an anxiety completely different in kind. See Or. Uniform Civ. Jury Ins. No. 70.06 ("previous infirm condition"). Finally, plaintiff does attest to specific, severe physical symptoms he experienced as part of his anxiety attacks, including being unable to breathe, shaking, "quaking," being unable to sleep, nausea, and loss of appetite. Pltf's Depo. at p. 20. He felt like his body was "shutting down." Id. Admittedly, the severity issue, like the conduct issue, is a close question. But, the facts are sufficient to create an issue for the jury.

CONCLUSION

Defendant's motion for partial summary judgment [43] is granted as to the debt collection practices claims before October

14, 2008, and is denied as to the IIED claim.

IT IS SO ORDERED.

Dated this 4th day of November, 2010.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge